

³ The Board notes that, following the March 27, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On August 22, 2017 appellant, then a 57-year-old mail carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 21, 2017 she suddenly experienced a sharp pain in her left foot, resulting in a limp, when walking outside while in the performance of duty. She stopped work on August 22, 2017.

In an August 21, 2017 statement, appellant reiterated her history of injury alleging that she was walking on her assigned route when she suddenly felt a sharp pain in her left foot, and began limping due to the pain.

On August 21, 2017 Dr. Charles B. Tang, Board-certified in occupational medicine, examined appellant and diagnosed strain of an unspecified muscle and tendon at the left ankle and foot.

On August 22, 2017 the employing establishment provided appellant with an authorization for examination and/or treatment (Form CA-16).

An August 25, 2017 magnetic resonance imaging (MRI) scan demonstrated a split tear of the peroneus brevis tendon and tenosynovitis.

Dr. Basimah Khulusi, a Board-certified physiatrist, examined appellant on August 22, 2017 and listed her history of walking at work and suddenly experiencing a sharp pain on the outside of her left foot. She noted that appellant sustained a left foot injury on June 15, 2017 diagnosed as posterior tendinitis of the posterior tibial tendon. Appellant returned to work on July 17, 2017. On September 6, 2017 Dr. Khulusi noted her August 21, 2017 employment incident and diagnosed left foot cuboid syndrome, split tear of the peroneus brevis tendon on the left, and left ankle sprain.

In a September 21, 2017 development letter, OWCP advised appellant of the deficiencies of her claim. It requested additional factual and medical evidence and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

Dr. Khulusi completed an October 11, 2017 report and found that on August 21, 2017 appellant injured the outside of her left foot while delivering mail. She again noted that she had a prior left foot injury on June 15, 2017, but was authorized to return to work with no restrictions on July 17, 2017. Dr. Khulusi diagnosed split tear of the peroneus brevis tendon on the left and left ankle sprain. She opined that appellant experienced a traumatic injury on August 21, 2017 when she traversed irregular landscape with an incline. Dr. Khulusi found that this caused extra stresses on the peroneal tendon group of the lateral aspect of her left foot and ankle resulting in strains of these tendons. She further opined that, after appellant returned to work on July 17, 2017 following her June 15, 2017 left ankle sprain, her injury had insufficient time to heal resulting in additional injury.

In an October 16, 2017 response to OWCP's development questionnaire, appellant argued that she had sustained a traumatic injury. She explained that she was walking on her route and felt a sudden sharp pain on the outer part of her left foot resulting in a limp. Appellant immediately reported her condition to her supervisor, who asked her to finish her route. She continued to work with difficulty and pain. Appellant asserted that she had no prior outer left foot condition, but on June 15, 2017 she was diagnosed with left posterior tibial tendinitis and, as a result, was totally disabled from work June 16 through July 16, 2017.

In a September 21, 2017 report, Dr. Stephen C. Wan, a podiatrist, opined that on August 21, 2017 appellant experienced acute onset of pain in her left foot and ankle while in the process of mail delivery. He noted a prior left foot injury. Dr. Wan reported that upon further questioning, appellant explained that immediately preceding the onset of pain, she traversed an uneven surface on an incline. He diagnosed strain of the peroneal tendon left foot and ankle. Dr. Wan attributed her condition to traversing an irregular landscape with an incline while at work and noted that the motion involved in negotiating this type of terrain required extra work for the peroneal tendon group on the lateral aspect of the foot and ankle, which may cause a strain of the peroneal tendon.

By decision dated October 26, 2017, OWCP denied appellant's traumatic injury claim, finding that she had not established that the incident had occurred in the manner she alleged. Thus, it concluded that she had not met the requirements to establish an injury as defined by FECA.

On May 10, 2018 appellant requested reconsideration of the October 26, 2017 decision. In support thereof, she submitted a November 22, 2017 narrative statement, wherein she noted that there was a heavy load of mail for delivery on August 21, 2017 and that her foot began to hurt and required stretching to continue working. After lunch, appellant alleged that her left foot pain returned, and as she completed her deliveries, she took a step and experienced a sharp and strong pain and could not bear weight on her left foot. She noted that she had been working for nine hours when her foot pain occurred and had been walking across many bumpy lawns, up and down steps, and on sloped driveways. Appellant also provided photographs of the residence she was delivering mail when the pain occurred and indicated that the driveway was sloped. She provided a May 3, 2018 report from Dr. Khulusi discussing the photographs of the terrain at the residence and also resubmitted Dr. Wan's September 21, 2017 report.

By decision dated May 23, 2018, OWCP denied modification.

On September 14, 2018 appellant requested reconsideration of the May 23, 2018 decision. She submitted a September 6, 2018 report from Dr. Khulusi who distinguished appellant's June 15, 2017 medial left foot injury from her August 21, 2017 lateral left foot condition and opined that August 21, 2017 left ankle sprain and split tear of the peroneus brevis tendon were employment related.

By decision dated December 3, 2018, OWCP denied modification.

On February 5, 2019 appellant requested reconsideration of the December 3, 2018 decision and submitted a January 24, 2019 report from Dr. Khulusi. Dr. Khulusi asserted that OWCP was not applying the correct law to the facts of appellant's case.

On April 30, 2019 OWCP referred a statement of accepted facts (SOAF) and the medical evidence to Dr. Ari Kaz, a Board-certified orthopedic surgeon and district medical adviser (DMA).

In a May 9, 2019 report, the DMA reviewed the medical evidence and found that walking was not a trauma event if it occurred at work. He found that there was no evidence in the medical reports of record to support a traumatic etiology to appellant's left foot pain.

By decision dated May 22, 2019, OWCP denied modification.

On June 27, 2019 appellant provided an appeal request form, but did not indicate which appeal option she wished to pursue. She also provided a June 13, 2019 report in which Dr. Khulusi opined that walking at work could constitute a compensable traumatic injury. She found that appellant experienced a traumatic injury on August 21, 2017 when she was walking while at work on August 21, 2017. Dr. Khulusi further disagreed with the DMA's finding that her ligaments were intact with no evidence of a sprain. She noted that appellant was consistently tender in the area of the peroneus brevis tendon and showed swelling in that area.

In a letter dated July 9, 2019, OWCP noted that on June 27, 2019 appellant had not indicated which avenue of appeal she wished to pursue and that no further action would be taken until such time as she selected one.

On August 2, 2019 appellant requested reconsideration and resubmitted Dr. Khulusi's June 13, 2019 report.

By decision dated October 9, 2019, OWCP denied reconsideration of the merits of appellant's claim, pursuant to 5 U.S.C. § 8128(a).

On December 10, 2019 appellant again requested reconsideration of the May 22, 2019 merit decision. She provided a November 22, 2019 report from Dr. Wan in which he asserted that she sustained an employment injury on August 21, 2017. Dr. Wan also disagreed with the findings and conclusions of the DMA and found that the mechanism of injury and the location of the injury, as well as the date of the injury, were all consistent with the context of appellant's claimed employment injury.

By decision dated March 27, 2020, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

LEGAL PRECEDENT

Section 8128(a) of FECA⁴ does not entitle a claimant to review of an OWCP decision as a matter of right.⁵ OWCP has discretionary authority in this regard and has impose certain

⁴ 5 U.S.C. § 8128(a). Under section 8128 of FECA, the (no quotes – no brackets) Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

⁵ This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.” 5 U.S.C. § 8128(a).

limitations in exercising its authority.⁶ One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.⁷ A timely request for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁸ When a timely request for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for review on the merits.⁹

In support of a request for reconsideration, an appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.¹⁰ He or she needs only to submit relevant, pertinent evidence not previously considered by OWCP.¹¹ When reviewing an OWCP decision denying merit review, the function of the Board is to determine whether OWCP properly applied the standards set for at section 10.606(b)(3) to the claimant's request for reconsideration and any evidence submitted in support thereof.¹²

ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a).

Appellant's request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered by OWCP. Consequently, she is not entitled to a review of the merits based on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

In support of her request for reconsideration, appellant submitted a November 22, 2019 medical report from Dr. Wan, wherein, he disagreed with the findings of the DMA and opined that the mechanism, location and date of injury were all consistent with the context of appellant's claimed employment injury. While this medical evidence is new, it is not relevant because it does not address the underlying issue of the present case which is factual in nature, *i.e.*, whether appellant submitted probative factual evidence supporting that she injured her left foot when she

⁶ 20 C.F.R. § 10.607.

⁷ *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of its decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the "received date" in the Integrated Federal Employees' Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

⁸ 20 C.F.R. § 10.606(b)(3).

⁹ *Id.* at § 10.608(b).

¹⁰ *F.E.*, Docket No. 20-0070 (issued August 4, 2020); *J.F.*, Docket No. 17-1508 (issued March 28, 2018).

¹¹ *See supra* note 2. *F.E., id.*; *Mark H. Dever*, 53 ECAB 710 (2002).

¹² *F.E., id.*; *Annette Louise*, 54 ECAB 783 (2003).

was walking and delivering mail on August 21, 2017. The Board has held that the submission of evidence or argument, which does not address the particular issue involved does not constitute a basis for reopening a case.¹³ Consequently, appellant is not entitled to a review of the merits based on the third above-noted requirements under 20 C.F.R. § 10.606(b)(3).

The Board, therefore, finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3).¹⁴ Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.¹⁵

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

¹³ *G.K.*, Docket No. 20-1026 (issued December 11, 2020); *M.K.*, Docket No. 18-1623 (issued April 10, 2019); *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

¹⁴ *R.R.*, Docket No. 20-0378 (issued March 9, 2021); *D.M.*, Docket No. 18-1003 (issued July 16, 2020); *Susan A. Filkins*, 57 ECAB 630 (2006) (when a request for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b), OWCP will deny the request for reconsideration without reopening the case for a review on the merits).

¹⁵ The Board notes that the employing establishment issued a Form CA-16. A complete Form CA-16 authorization may constitute a contract for payment of medical expenses to a medical facility or physician, when properly executed. The form creates a contractual obligation, which does not involve the employee directly, to pay for the cost of the examination or treatment regardless of the action taken on the claim. *See* 20 C.F.R. § 10.300(c); *S.P.*, Docket No. 191904 (issued September 2, 2020); *J.G.*, Docket No. 17-1062 (issued February 13, 2018); *Tracy P. Spillane*, 54 ECAB 608 (2003).

ORDER

IT IS HEREBY ORDERED THAT March 27, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 19, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board